

IN THE MATTER OF MERCHANT SEAMAN'S DOCUMENT NO. Z-1102949-D1 AND

Issued to: Lars A. GOLTEN

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1982

Lars A. GOLTEN

This appeal has been taken in accordance with title 46 United States code 239(g) and title 46 Code of Federal Regulations 137.30-1.

By order dated 21 July 1972, an Administrative Law Judge of the United States coast guard at Portsmouth, Virginia, suspended appellant's seaman's document for six months on 12 months' probation upon finding him guilty of negligence. The specification found proved alleges that while serving as Tankerman on board the Tank Barge ROBERT L. POLING under authority of the document above described, on or about 23 September 1971, Appellant negligently failed to insure that all cargo valves not connected with the discharge of cargo were in a closed position, thereby contributing to spillage of cargo into Baltimore Harbor on 24 September 1971.

At the hearing, appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony of several witnesses and transcripts from oral depositions.

In defense, Appellant offered in evidence his own testimony.

At the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. The Administrative Law Judge then served a written order on Appellant suspending all document, issued to him, for a period of six months on 12 months' probation.

The entire decision was served on 3 August 1972. Appeal was timely filed on 8 August 1972. A brief in support of appeal was received on 28 November 1972.

FINDINGS OF FACT

On 23 and 24 September 1971, Appellant was serving as Tankerman on board the Tank Barge ROBERT L. POLING and acting under authority of his document while the ship was in the port of Baltimore, Maryland. Because of the disposition of this case no other findings are required.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. In view of my decision in this case, the specific points raised need not be stated.

APPEARANCE: Crowell, Rouse & Varian of Brooklyn, New York by
Jr., Esq.

William t. Foley,

OPINION

I

The specification found proved in this case alleges that Appellant negligently failed to insure that all cargo valves not connected with the discharge of cargo were in a closed position, thereby contributing to the spillage of cargo into Baltimore Harbor. In order to sustain this finding, it must appear from the evidence that Appellant was under a duty to insure that the valves were in a closed position and that he failed to conform his conduct to meet this duty. A mere finding that a spill of some 2200 gallons of gasoline occurred and that appellant was the tankerman on board the barge at the time of the spill is insufficient to prove the charge of negligence. It must appear that the actions undertaken by appellant were not those which would have been taken by a reasonable and prudent person under similar circumstances. I conclude that such evidence is missing in the present case.

The findings and conclusions of the Administrative Law Judge are predicated on the existence of the regulations found at 46 CFR 35.35-20 & 35 which state that the senior deck officer on duty, who shall be a licensed officer or certificated tankerman, is to supervise the operation of the discharge of cargo and is to inspect the cargo valves prior to commencing discharge operations. It is concluded that the failure to make the inspection prior to the time of engagement of the discharge pump constitutes this breach of duty and is therefore negligence. However, since the evidence discloses that it was not Appellant who engaged the pump to begin the discharge and that he gave no such orders, he cannot be held for failing to carry out his duty unless it is also proved that he was negligent in allowing the situation to exist in which the pump could have been engaged prior to his final inspection. In other words, it must appear that by starting the forward engine, prior to checking all of the cargo connections, appellant was not acting in a reasonable and prudent manner.

II

The evidence reveals that it was necessary to start the engine in order to allow it to warm up for a period before the clutch was engaged to start the pump and also in order to operate the barge's hydraulic equipment. Appellant testified that it was normal procedure and in fact necessary to operate the hydraulic equipment in order to move the hoses into proper position to effectuate the discharge of cargo. It does not seem reasonable to require that the various connections be inspected before the hoses were moved into position to be attached, rather, prudence would require a final check after all attachments had been made.

Further, there was testimony from both Appellant and other witnesses that the normally followed procedure was to start the engine and allow it to warm up for a period of between fifteen

minutes to a half and hour before commencing pumping. Evidence of customary procedure is evidence of reasonable care under the circumstances unless it is shown that the customary practice itself was negligent. No such evidence appears from the record. This is not to say that such a practice is necessarily condemned or is to be engaged in in every case, but only that in this particular case such was not shown to be negligent conduct. I am, therefore, led to the conclusion that in following this customary procedure Appellant was acting in a reasonably prudent manner and cannot be faulted because the pump was engaged prior to the completion of his final inspection unless he can be held for the actions of the person who actually engaged the pump.

III

If Appellant is to be held for the actions of a crewmember of the JUNE C., it must be either on the basis that Appellant had a duty to guard against the crewmember's negligence or that the latter's negligence may in some way be imputed to Appellant. Considering, first, the latter theory, of holding one for the acts of another, the most usually applied situation is that where there is a relationship of master-servant between the person being held for the act and the person who commits the act. This respondeat superior liability is only applied where one is the employer of the other and is more financially responsible for the resulting loss. Neither of these justifications is present in this case. Appellant was not the employer of the crewmember from the tug and had no other unique relationship with him which would justify the imputation of his negligence to Appellant.

In a given situation one may be acting negligently by failing to take precautions against the possible negligence of a third person or of some other intervening force. Here, there was no reason why Appellant should have recognized the existence of an unreasonable risk of harm resulting from the possible actions of the tug's crew. There was evidence that the two had worked together for a considerable period of time following the same procedure which was followed on this particular occasion. The act of the tug's crewmember in starting the pump before other normal procedures were completed must be considered as an independent act of negligence on his part; it is insufficient to support a finding of negligence on Appellant's part.

CONCLUSION

The specification alleging a negligent failure to insure that all cargo valves not connected with the discharge of cargo were in a closed position has not been proved by substantial evidence. Accordingly, the findings of the Administrative Law Judge are set aside and the charge is dismissed.

ORDER

The order of the Administrative Law Judge dated at Portsmouth, Virginia on 21 July 1972, is VACATED. The charge is DISMISSED.

T.R. SARGENT
Vice Admiral, U. S. Coast Guard

Acting Commandant

Signed at Washington, D.C., this 27th day of July 1973.

INDEX

Decisions of Examiners

- Reversed when not based on substantial evidence

Negligence

- Failure to inspect piping prior to discharge

- Defined

- Not shown by evidence

- Not shown by negligent act of fellow worker

- Regulations concerning, effect of

- Customary practices

Substantial evidence

- Lack of, grounds for reversal.